No.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

ALVIN J. OWEN, SR., ADMINISTRATOR,
PETITIONER,

v.

ROBERT W. MESERVE ET AL.,
TRUSTEES OF THE PROPERTY OF THE BOSTON
AND MAINE RAILROAD CORPORATION,
RESPONDENTS.

Respondents' Brief in Opposition to Petition for Writ of Certiorari.

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Question Presented.

Petitioner's brief misstates the nature of the legal issue sought to be reviewed. This issue is whether that portion of Massachusetts G.L. c. 229, § 2, limiting the liability of railroads to persons unlawfully on railroad property, violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. The Massachusetts Supreme Judicial Court, in an opinion now reported as *Owen* v. *Meserve*, Mass. Adv. Sh. (1980) 1825, decided that Mass. G.L. c. 229, § 2 was not violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution, and affirmed the judgment of the trial court.

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The respondents, Robert W. Meserve et. al., Trustees of the Property of the Boston and Maine Railroad Corporation, file this brief in opposition to plaintiff's petition for writ of certiorari to review the judgment of the Massachusetts Supreme Court in this case.

Opinion Below.

The opinion of the Massachusetts Supreme Judicial Court is reported at Mass. Adv. Sh. (1980) 1825, 408 N.E.2d 867 (1980), and is reproduced in the appendix attached hereto.

Jurisdiction.

The jurisdiction of the Court is invoked under Title 28, United States Code, § 1257, which authorizes the review by the Supreme Court of a final judgment rendered by the highest court of a state by writ of certiorari where the validity of the state statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

Statutes and Constitutional Provisions.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS CHAPTER 229, SECTION 2.

Wrongful death; liability for damages: A person who (1) by his negligence causes the death of a person in the exercise of due care, or (2) by wilful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, shall be liable in damages in the sum of not less than five thousand nor more than fifty thousand dollars, to be assessed with reference to the degree of his culpability and distributed as provided in section one; except that (1) the liability of an employer to a person in his employment shall not be governed by this section, (2) a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier, and (3) a person operating a street railway or electric railroad shall not be liable for negligence for causing the death of a person while walking or being upon that part of the street railway or electric railroad not within the limits of a highway. A person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the damages shall be assessed with reference to the degree of culpability of his agents or servants Damages under

this section shall be recovered in an action of tort by the executor or administrator of the deceased. No recovery shall be had under this section for a death which does not occur within two years after the injury which caused the death. An action to recover damages under this section shall be commenced within two years from the date of death or within such time thereafter as is provided by section four, four B, nine or ten of chapter two hundred and sixty.

Statement of the Case.

The respondents accept the petitioner's statement of the case.

Statement of Facts.

On June 1, 1971, at about 5:15 P.M., three persons were coming up an abutment of a railroad bridge over Adams Street in Malden. There were two sets of tracks in this area; the so-called westbound tracks on which trains travel to Boston from Reading, and the eastbound tracks on which trains travel to Reading from Boston. The track area and the trains operating thereon were owned by the defendant railroad.

The roadbed of the track was between nineteen or twenty feet to possibly thirty feet above the street area below.

In the area within 500 to 1,000 feet from where the accident occurred, there were residences, a gas house, factories and a ballfield.

Children were seen on occasion by the defendants' engineers.

As the engineer of a four-car Budd train travelling east toward Reading approached the area of the accident, he saw the three persons come up onto the embankment of the railroad bed. They were approximately 1,500 feet away when first seen. One of the three lost his balance and rolled down the embankment into a fence. The other two persons crossed the westbound track and stepped onto the eastbound track at which point the engineer of the eastbound train blew the air horn by pulling on the rope until the rope broke. When the air horn was sounded, both persons (now observed to be boys) moved into the middle of the westbound track, one behind the other.

At some point, both the engineer and fireman of the eastbound train saw a train approaching from the opposite direction. Both the engineer and fireman tried to warn the two boys of the approach of the oncoming train by pointing and waving their hands. Both boys stood in the middle of the westbound track jumping up and down; the boy in front stuck his tongue out, and both boys made obscene gestures to the engineer and fireman with their fingers, hands, and arms.

The westbound train was being operated by the fireman who was a qualified engineer, and the engineer was sitting on the fireman's side, that is, the left side of the front of the train. The westbound train consisted of four Budd cars, had its headlight on, and the bell was ringing. The train was travelling about seventy miles per hour. The fireman noticed the boys on the eastbound track when they were about 400 feet away. He then sounded the horn and about a second later, upon seeing the boys cross into the westbound track, he threw on the emergency brake which is known in railroad parlance as the "deadman." This caused all the brakes to go on and sand to be pumped under the wheels. The train travelled

about 300 feet to the point where it struck the boys at about sixty-five miles per hour and continued on about 2,000 more feet to a stop.

On the date of his death, Alvin J. Owen, Jr. was fourteen years, eleven months, and eleven days old.

Reasons Why the Writ Should Not be Granted.

The petitioner in his brief cites and discusses a number of cases dealing with the duty of care required of the landowner toward a trespasser. Nowhere in his brief does he dispute the respondents' contention that the decedent was a trespasser.

Cases such as *Mounsey* v. *Ellard*, 363 Mass. 693, 297 N.E.2d 43 (1973); *Pridgen* v. *Boston Housing Authority*, 364 Mass. 696, 308 N.E.2d 467 (1974); *Kalinowski* v. *Smith*, Mass. App. Ct. Adv. Sh. (1978) 1261, 383 N.E.2d 550 (1978); and *Soule* v. *Massachusetts Electric Company*, Mass. Adv. Sh. (1979) 1380, 390 N.E.2d 716 (1979), cited by the petitioner, have no application to this case because they do not invoke the statutory limitation of Mass. G.L. c. 229, § 2.

The only evidence as to the decedent's status on the respondents' property clearly shows that he was a trespasser. Therefore, in order to recover, it was incumbent upon the petitioner to make a showing of wilful, wanton or reckless conduct on the part of the respondents. The respondents submit that the record in this case is devoid of any such conduct on their part.

On June 5, 1972, the Supreme Judicial Court of Massachusetts decided the case of *Gaudette* v. *Webb*, 362 Mass. 60, 284 N.E.2d 222 (1972), stating that there is a common law right of action for death. The court said further that

the wrongful death statutes will no longer be regarded as "creating the right" to recover for wrongful death. *Gaudette* v. *Webb* at 71.

However, the court did not say that the limitations set forth in Mass. G.L. c. 229, § 2 are no longer applicable. Nowhere in that case does the court strike out the provision that a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law.

The common law right of action for wrongful death is not without the limitations provided in Mass. G.L. c. 229. All that happened in the *Gaudette* case is that the Supreme Judicial Court "found a way to relieve litigants in Massachusetts from an unfairly rigid prior rule governing the application of the statute of limitation." *Meagher* v. *Electrolux Corporation*, 388 F. Supp. 1009, 1011 (D. Mass. 1975).

There can be no claims for additional common law recovery outside the limitations provided by Mass. G.L. c. 229, § 2. *Minkley* v. *MacFarland*, 371 Mass. 891, 356 N.E.2d 1391 (1976).

If there had been any doubt as to the legislature's intent on this matter, this was dispelled in 1973, the year following the *Gaudette* decision. The General Court, by its enactment of St. 1973, c. 699, § 1, approved August 27, 1973, drastically changed the nature of the death statute. However, it retained that provision limiting a railroad's liability for causing the death of a trespasser.

Because Mass. G.L. c. 229, § 2 involves neither a suspect classification nor a fundamental interest, necessitating strict scrutiny of the legislative classification, it cannot be considered violative of the Fourteenth Amendment's equal protection clause. Equal protection analysis requires strict scrutiny of the legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right (*e.g.*, a right of uniquely private nature, the

right to vote, the right of interstate travel, and rights guaranteed by the First Amendment), or operates at a peculiar disadvantage to a suspect class, *e.g.*, an alienage, race, or ancestry. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976).

There has been no showing by the petitioner that all persons similarly circumstanced as he are treated other then equally. Further, Mass. G.L. c. 229, § 2 does not involve a fundamental right.

If the legislative classification is based on suspect criteria, or if it infringes on a fundamental right, it can be justified if it was necessary for the furtherance of a compelling governmental interest. However, if the classification was not based on suspect criteria or did not infringe on a fundamental right, traditional equal protection analysis would be used, and the classification would be upheld unless it was based on grounds wholly irrelevant to the achievement of the governmental objective.

The United States Supreme Court while still recognizing and employing the two tiered analysis for many situations, has also applied a different analysis in many cases which have not involved other suspect classifications or fundamental rights. This intermediate standard requires that the classification bear a fair and substantial relation to the objective of the legislation.

The United States Supreme Court has employed an intermediate standard when dealing with classifications which are based on criteria which could easily be termed suspect, *i.e.*, sex and illegitimacy, or when dealing with classifications which, while not infringing upon fundamental rights explicitly or implicitly guaranteed by the constitution, approach sensitive and fundamental personal rights. See "Constitutional Law — Wrongful Death," 8 Cum. L. Rev. 567-578 (1978).

Petitioner has not cited any cases to support his contention that the extent of harm is a suspect classification, which would

necessitate the standard of strict scrutiny for validation of Mass. G.L. c. 229, § 2. However, it is argued that the case before us "must be examined by the middle tier review as the right to life is fundamental." See petitioner's petition at p. 7.

Accordingly, in order for Mass. G.L. c. 229, § 2 to be violative of the equal protection clause, it must be shown that it does not bear fair and substantial relation to the objective of the legislation so determined under the newer and more strict analysis of equal protection, or that there is not a rational basis for the classification. In either case, the petitioner has again failed to cite any cases which show that Mass. G.L. c. 229 has other than a fair and substantial relation to the objective or the legislation, the objective of that part of the legislation being to discourage trespassers on railroad property, as well as the goal of an effective transportation system. *Owen* v. *Meserve*, Mass. Adv. Sh. (1980) 1825, 1829, 408 N.E.2d 867 (1980). In addition, the legislative classification of Mass. G.L. c. 229, § 2 is not under-inclusive because a single duty owed by a railroad to all persons on its tracks in violation of law has not yet been established.

Conclusion.

For the reasons set forth above, the respondents herein submit that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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ALVIN J. OWEN, SR., administrator, vs. ROBERT W. MESERVE & another, trustees.

Middlesex. April 9, 1980. — August 5, 1980.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, WILKINS, & ABRAMS, JJ.

Negligence, Railroad, Trespasser. *Constitutional Law*, Equal protection of laws.

TORT. Writ in the Superior Court dated May 25, 1972.

The case was tried before *Mitchell*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Donald P. Garrity (*James A. McDonald, Jr.*, with him) for the plaintiff.

Francis J. Bousquet & Frank A. Smith, III, for the defendants.

BRAUCHER, J. On June 1, 1971, the plaintiff's intestate, a fifteen-year-old boy, was struck and killed by a passenger train of the defendants, trustees of the Boston & Maine Corporation (railroad). A verdict has been directed for the defendant in the plaintiff's action for wrongful death by virtue of a provision in G. L. c. 229, § 2, as amended through St. 1967, c. 666, § 1: "a person operating a railroad shall not be liable for negligence in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier." The plaintiff contends that he has a common law claim not subject to the statute and, alternatively, that the statute denies equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. We reject these contentions and uphold the judgment.

The plaintiff's complaint contains four counts, one for conscious pain and suffering as a result of the defendants' negligence, one for wrongful death as a result of the defendants' negligence, one for conscious pain and suffering as a result of the defendants' willful, wanton and reckless conduct, and one for wrongful death as a result of the defendants' willful, wanton and reckless conduct. The case was tried before a jury and at the close of all the evidence the judge allowed the defendants' motion for a directed verdict. The plaintiff appealed from the resulting judgment, and we transferred the case from the Appeals Court on our own motion.

There was evidence of the following facts. About 5:15 P.M. the boy and a friend climbed the abutment of a railroad overpass in Malden and stepped onto the roadbed of the railroad. The engineer and the fireman of a train bound for Boston, travelling seventy miles an hour, saw them about 400 feet ahead, in the path of an oncoming train bound for Reading. The Reading-bound train blew its air horn and the boys moved into the path of the Boston-bound train. The engineer and the fireman of the Reading-bound train tried to warn the boys by pointing down the track, but the boys responded with obscene gestures. The fireman of the Boston-bound train sounded his horn and applied the brakes, but the train hit the boys at a speed of sixty to sixty-five miles an hour and continued about 2000 feet before coming to a stop.

The plaintiff does not now contend that there was evidence of the boy's conscious pain and suffering or of the defendants' willful, wanton or reckless conduct. Nor does he contend that the boy was lawfully on the railroad track. He argues that the railroad owed him a common law duty of reasonable care, not subject to the statutory limitation on wrongful death actions, citing *Pridgen* v. *Boston Hous. Auth.*, 364 Mass. 696, 713 (1974) ("helplessly trapped" trespasser); and *Soule* v. *Massachusetts Elec. Co.*, Mass. , (1979)[a] ("foreseeable child trespassers"). Alterna-

[a] Mass. Adv. Sh. (1979) 1380, 1385.

tively, he argues that the statutory distinction between trespassers who are injured and trespassers who are killed is irrational and impermissible as a denial of equal protection.

In *Gaudette* v. *Webb*, 362 Mass. 60, 71 (1972), we held that "the right to recovery for wrongful death is of common law origin," and that statutes limiting the period for bringing actions for death may be tolled pursuant to G. L. c. 260. But we clearly stated that other provisions of G. L. c. 229, § 2, imposed limitations on such recovery. In *Minkley* v. *MacFarland*, 371 Mass. 891 (1976), we rejected claims for common law recovery in addition to a statutory claim for wrongful death. See *Meagher* v. *Electrolux Corp.*, 388 F. Supp. 1009, 1011 (D. Mass. 1975). Recovery for wrongful death remained subject to the statutory provisions, including the denial of recovery for wrongful death of a trespasser caused by the negligence of a railroad. *Corrado* v. *New York, N.H. & H. R.R.*, 333 Mass. 417, 419-420 (1956). We consider no question as to the effect of St. 1973, c. 699, § 1, effective January 1, 1974, and subsequent amendments to G. L. c. 229, § 2.

A limitation on the recovery of damages for wrongful death does not impinge on a constitutionally protected substantive right and is not predicated on a constitutionally suspect classification. Hence the validity of the classification must be sustained against the plaintiff's equal protection claim unless the classification rests on grounds wholly irrelevant to the achievement of any legitimate governmental objective. *Harris* v. *McRae*, U.S. , (1980).[b] See *Paro* v. *Longwood Hosp.*, 373 Mass. 645, 648-651 (1977).

We assume, without deciding, that in a case similar to the present one a child who was injured but not killed could recover damages on the basis of the negligence of the railroad without showing willful, wanton or reckless conduct. Cf. *Kalinowski* v. *Smith*, Mass. App. Ct. ,

[b] 48 U.S.L.W. 4941, 4948 (June 30, 1980).

(1978)[c] (child of four years and eight months). "Under the traditional common law analysis," however, willful and wanton misconduct would be required. *Soule* v. *Massachusetts Elec. Co.*, Mass. , (1979).[d] We recognize that changing conditions may render a statute unequal in its operation and invalid even though it was valid when enacted. *Vigeant* v. *Postal Tel. Cable Co.*, 260 Mass. 335, 342 (1927). But we do not think our decision in the *Soule* case, adopting a more modern view of common law liability to child trespassers, rendered invalid a contrary statutory rule that retained some rational force.

The law governing recovery for wrongful death has been largely statutory in the United States, and has varied from State to State. See 1 S.M. Speiser, Recovery for Wrongful Death § 1:9 (2d ed. 1975). The governing statute in Massachusetts in 1971 defined the beneficiaries of such recovery, fixed maximum and minimum dollar amounts, and provided for assessment of damages with reference to the degree of the defendant's culpability. Thus the principles governing recovery for death were different in many important respects from those governing personal injury. We seem never to have passed on the constitutionality of such differences, but equal protection challenges to similar differences have been rejected in other States. *Butler* v. *Chicago Transit Auth.*, 38 Ill. 2d 361, 365 (1967) (maximum recovery). *Glick* v. *Ballentine Produce Inc.*, 396 S.W.2d 609, 615 (Mo. 1965), appeal dismissed, 385 U.S. 5 (1966) (same). *Gibbs* v. *Prior*, 107 N.H. 218, 220 (1966) (same). *Cogger* v. *Trudell*, 35 Wis. 2d 350, 360 (1967) (denial of recovery by children when spouse survives). Cf. *Pinnick* v. *Cleary*, 360 Mass. 1, 27-31 (1971) (limitation of damages for pain and suffering in automobile cases). So far as *In re Paris Air Crash of March 3, 1974*, 427 F. Supp. 701, 708 (C.D. Cal. 1977), indicates that damage rules for wrongful death cases must harmonize with the rules for per-

[c] Mass. App. Ct. Adv. Sh. (1978) 1261, 1265.

[d] Mass. Adv. Sh. (1979) 1380, 1383.

sonal injury and property damage cases, we do not follow that decision.

The exception negating railroad liability for negligence resulting in the death of a trespasser first appeared in St. 1853, c. 414, § 2, and it was carried into G. L. c. 229, § 3 (1932). At that time no liability was imposed for death resulting from willful, wanton or reckless conduct of a railroad. *Foynes* v. *New York Cent. R.R.*, 276 Mass. 89, 92 (1931). Thus the railroad's only liability was based on negligence, and the exception apparently negated any liability of a railroad for the death of a trespasser on its right-of-way. Liability for willful, wanton or reckless conduct was added by St. 1941, c. 460, § 2, but the exception remained coextensive with the liability. The exception disappeared in the revisions by St. 1946, c. 614, and St. 1947, c. 506, which changed recovery from a "punitive" to a "compensatory" basis, but it was restored by St. 1949, c. 427, § 3, inserting G. L. c. 229, § 2A. See *Gaudette* v. *Webb*, 362 Mass. 60, 66-67 n.4 (1972). By St. 1958, c. 238, § 1, amending G. L. c. 229, § 2, the exception was limited to the liability of a railroad "for negligence," and so it remained at the time of the death now in issue. At that time, therefore, a railroad apparently might have become liable for the death of a trespasser resulting from its willful, wanton or reckless conduct.

This history suggests that the Legislature, in fixing the rules for recovery against a railroad for the death of a trespasser, balanced the goal of an effective transportation system against the danger of death to trespassers, taking into account the degree of culpability of the railroad and the opportunity of the trespasser to avoid the hazard. The balance was struck differently at different times; sometimes it coincided with the balance struck by our common law decisions on comparable cases of personal injury, sometimes it did not. But we are not prepared to say that the balance provided by the Legislature in 1971 was wholly irrelevant to the achievement of any legitimate governmental objective.

Judgment affirmed.